KONSORTIUM KOPKAD SDN BHD v. KONSORTIUM KOPERASI PENGGUNA MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[ORIGINATING SUMMONS NO: S-22-226-2010]
22 SEPTEMBER 2015

CONTRACT: *Damages – Measure of damages – Breach of condition precedent – Whether ordinary measure of damages applicable – Whether compensation should be awarded as though agreement had been performed – Whether contrary to intention of parties – Proper measure of damages – Whether expenses incurred up to expiry period specified for fulfilment of condition precedent – Whether Registrar erred in awarding damages based on expected profit*

CONTRACT: *Damages – Interest – Delay of Registrar to deliver decision on assessment of damages – Whether fair and just for interest to run from date of decision of liability by trial judge – Whether interest should run from date of grounds of Registrar's decision*

The plaintiff entered into an agreement ('the agreement') with the defendant to provide to its members a multi-purpose card facility. The defendant, however, breached its obligations under the agreement and the plaintiff sued the defendant. The trial judge held that the defendant had breached the agreement for failure to pay the deposit sum of RM10 for each member of the defendant which was a condition precedent pursuant to cl. 1.4 and 1.5 of the agreement and to provide the plaintiff with the database to be encoded on the smart cards. Therefore, judgment was given in favour of the plaintiff and the Registrar assessed damages at RM26 million. Aggrieved, the defendant filed a notice of appeal. The grounds of the decision of the Registrar was provided after almost ten months had elapsed from the filing of the notice of appeal. The sole issue that arose for consideration was the appropriate measure of damages for breach of a condition precedent in a contractual claim.

Held (allowing defendant's appeal with costs):

(1) The ordinary measure of damages *ie* the loss of the plaintiff's bargain would not be applicable since the parties had clearly intended for performance by the plaintiff to be excused in the event of non-fulfilment of the condition precedent. To hold that the plaintiff was to be excused from performance but the plaintiff ought to be compensated as though the agreement had been performed was inconsistent and contrary to the intent of the parties based on a true construction of the agreement. The proper measure of damages are the expenses that that other party had

incurred up to the expiry of the period specified for fulfilment of the condition precedent, or if no such period was specified, the date on which that party was entitled to have treated the contract at an end. Accordingly, the decision of the Registrar to award RM26 million to the plaintiff based on the expected profit that the plaintiff would have been able to obtain under the agreement was incorrect. (paras 12 & 13)

(2) Damages was assessed to be RM1,337,129 based on the fact that the plaintiff is a special purpose company. It would not be inappropriate to use the accumulated losses of the plaintiff as disclosed in the profit and loss statement of the plaintiff. Such losses would be representative of the expenses that the plaintiff would have incurred in pursuance of the agreement. Interest on damages assessed at a rate of 5% per annum was ordered to be paid by the defendant from the date on which the grounds of the Registrar's decision was provided until full settlement. Interest was not awarded to run from the date of the decision on liability by the trial judge as it would be unfair on the defendant to do so, on account of the unexplained delay on the part of the Registrar to deliver a decision on the assessment of damages and to deliver the grounds for such decision. (para 14)

Case(s) referred to:
Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [2002] 4 CLJ 259 FC ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Ong Boon Him & Anor v. Tan Oh Tee & Anor [1937] 1 LNS 45 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 42 r. 12

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] This is an appeal against the decision of the Registrar of this court in assessing damages arising from a contractual claim.

Brief Facts

[2] The defendant is an umbrella cooperative. The plaintiff entered into an agreement (the agreement) with the defendant to provide to its members a multi-purpose card facility carrying certain benefits, privileges and services. The defendant breached its obligations under the agreement and the plaintiff successfully sued the defendant, obtaining judgment on 28 February 2013. Written grounds were provided on 14 May 2013.

[3] The learned trial judge held that the defendant had breached the agreement "for failure to pay the deposit sum which is a condition precedent pursuant to cls. 1.4 and 1.5 of the agreement and to provide the plaintiff with the database". The deposit sum was to have been RM10 for each member of the defendant and the database referred to certain data that were to be encoded on the smart cards.

[4] The trial judge ordered for damages to be assessed before a Registrar of this court. On 23 September 2014, the Registrar assessed damages at RM26 million. The defendant filed a notice of appeal the following day. The grounds of the decision of the Registrar was provided on 20 July 2015, after almost ten months had elapsed from the filing of the notice of appeal.

[5] I heard submissions of counsel on 9 September 2015, but directed that further submissions be made on the appropriate measure of damages for breach of a condition precedent in a contractual claim. I heard further submissions on 18 September 2015. This is a written decision delivered on 22 September 2015 on the defendant's appeal.

Decision

[6] The crisp issue for determination in this case is the appropriate measure of damages for breach of a condition precedent in a contractual claim.

[7] Before I proceed, I wish to observe that it is not open to me in these proceedings to re-examine the finding by the trial judge that there has been a breach of a condition precedent in the agreement. The legal effect of a breach of a condition precedent by one party is that the other party will be discharged from its obligations under the contract in question.

[8] The basic measure of damages for contractual claims is the loss of the bargain that has been occasioned to the plaintiff. The object would be to put the plaintiff in the position he would have been had the contract been performed. It is trite that a plaintiff may also elect to claim not its loss of bargain but the expenses incurred in preparation or in part performance of the contract.

[9] In the present case, the parties had expressly described the obligation to pay the deposit sum as a "condition precedent". It follows therefore that the parties had intended for the plaintiff to be discharged from its obligations in the event that the defendant failed to pay the deposit sum.

[10] The observation may be made that this does not mean that there was no contract between the parties - it is abundantly clear that there was, but that the parties had intended for the obligations of the plaintiff to be conditional upon the payment of the deposit sum. It is also abundantly clear

A that the fulfilment of this condition precedent was within the control of the defendant, and was an obligation of the defendant. Some conditions precedent depend on circumstances outside the control of the parties, such as third party or governmental approvals. This was not the case here.

B **[11]** Accordingly, this is not the case where the parties had intended for there to be no liability for damages in the event that the condition precedent was not fulfilled. It follows therefore that the failure by the defendant to pay the deposit sum renders it liable to damages, as was so held by the trial judge.

[12] In my judgment, where:

C (a) a condition precedent is to be fulfilled by, and expressed to be an obligation of, one of the parties to a contract; and

(b) the failure by that party to fulfil the condition precedent, based on a proper construction of the contract, discharges the other party from performing its obligations under the contract,

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the proper measure of damages are the expenses that that other party had incurred up to the expiry of the period specified for fulfilment of the condition precedent, or if no such period was specified, the date on which that party was entitled to have treated the contract at an end.

E **[13]** The ordinary measure of damages - the loss of the plaintiff's bargain - would not be applicable in such circumstances, since the parties had clearly intended for performance by the plaintiff to be excused in the event of non-fulfilment of the condition precedent. To hold that, on the one hand, the plaintiff was to be excused from performance but on the other hand, the

F plaintiff ought to be compensated as though the agreement had been performed would not only be inconsistent but also contrary to the intent of the parties, based on a true construction of the agreement. Accordingly, the decision of the Registrar to award RM26 million to the plaintiff based on the expected profit that the plaintiff would have been able to obtain under the

G agreement was incorrect.

[14] I therefore assess damages to be RM1,337,129, based on the fact that the plaintiff is a special purpose company, and therefore it would not be inappropriate to use the accumulated losses of the plaintiff as disclosed in the profit and loss statement of the plaintiff for the year ended 31 December

H 2005[1]. Such losses would be representative of the expenses that the plaintiff would have incurred in pursuance of the agreement. The defendant shall pay interest on such damages assessed at a rate of 5% per annum from 20 July 2015 (being the date on which the grounds of the Registrar's decision was provided) until full settlement. I have not awarded interest to run from the

I date of the decision on liability by the trial judge as it would be unfair on the defendant to do so, on account of the unexplained delay on the part of the Registrar of the court to firstly deliver a decision on the assessment of damages at first instance[2], and secondly to deliver the grounds for such decision.

[15] In this regard, there is authority for the proposition that where a judgment provides for damages to be assessed, the statutory interest does not run until the assessment of damages: see *Ong Boon Him & Anor v. Tan Oh Tee & Anor*[3]. On the other hand, there are also more recent cases that state that where a judgment directs for damages to be assessed, that judgment carries interest from the date of the entry of the judgment, and not the date of assessment: see for example the remarks of Abdul Malek Ahmad FCJ in *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors*[4], a decision dealing with the taxation of costs.

[16] I am of the view that, although the latter case represents the general position in law, the court has the discretion to determine that interest is to run from another date, where it would be just and fair to do so. In *Lim Eng Kay v. Jaafar Mohamed Said*[5], the Federal Court ruled that the court retains a discretion to award interest at a rate lower than the statutorily prescribed rate. It would follow therefore the court would also have a discretion to determine when interest should run, notwithstanding the provisions of O. 42 r. 12 of the Rules of Court 2012. To award interest at 5% per annum to run from 20 July 2015, is the same as ordering interest to be nil between 28 February 2013 and 19 July 2015 (which the court would be entitled to do based on *Lim Eng Kay*'s case) and for the rate to be 5% per annum thenceforth.

[17] The plaintiff is to pay RM10,000 as costs of this appeal.

Endnote:

1. See p. 149 of Bundle B.
2. The original date for decision was fixed for 4 June 2014, but a decision was only delivered on 23 September 2014.
3. [1937] 1 LNS 45; [1937] 1 MLJ 122.
4. [2002] 4 CLJ 259; [2002] 4 AMR 3873.
5. [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156.